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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL CHAVEZ-TORRES, Defendant and Appellant.	C078946 (Super. Ct. No. 14F01904)

Defendant Gabriel Chavez-Torres was convicted of multiple counts of sexual abuse of a minor. Defendant challenges his conviction of attempted sexual intercourse with a child 10 years of age or younger, contending the trial court erred by instructing on attempt because it is not a lesser included offense of the completed crime for which he was charged. Defendant also contends the trial court erred by giving coercive supplemental instructions when it ordered the deadlocked jury to resume deliberations on two counts. We shall reverse the conviction of attempted sexual intercourse with a child 10 years of age or younger, remand for resentencing and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with committing a lewd and lascivious act on a child under the age of 14 years by use of force (Pen. Code, § 288, subd. (b)(1)—count one),[1] committing a lewd and lascivious act on a child under the age of 14 years (§ 288, subd. (a)—counts two, three, four, five, seven & eight), and having sexual intercourse with a child 10 years of age or younger (§ 288.7, subd. (a)—count six).

The trial court, *sua sponte* and over defendant's objection, instructed the jury on attempted sexual intercourse with a child 10 years of age or younger as a lesser included offense of sexual intercourse with a child 10 years of age or younger. (§ 664.) The trial court reasoned the intent required for attempted sexual intercourse with a child was "indistinguishable" from the intent required for completed sexual intercourse with a child. The trial court also reasoned there was no prejudice to defendant because it would have permitted the People to amend the information.

The jury began deliberations on March 9, 2016, at 1:57 p.m. and adjourned for the day at 4:05 p.m. Deliberations resumed the next morning at 9:05 a.m. and lasted until 11:55 a.m., when the jury informed the trial court it had reached verdicts on six counts but was deadlocked on two counts—count two and the "lesser" included offense to count six. The jury reported it needed "additional information" to move forward with those counts. The trial court held a sidebar with counsel and then took the verdicts the jury had reached: not guilty of engaging in sexual intercourse with a child 10 years of age or younger (count six), and guilty of counts one, three, four, five, and seven.

The trial court then gave the jury "further instructions as follows: [¶] Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequence of your verdict

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[1] Undesignated statutory references are to the Penal Code.

regardless of how long it takes to do so. [¶] It is your duty as jurors to carefully consider, weigh and evaluate all the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors. [¶] In the course of your further deliberations, you should not hesitate to reexamine your own views or to request that your fellow jurors reexamine theirs. [¶] You should not hesitate to change a view once held if you are convinced that it is wrong or to suggest other jurors change their views if you are convinced that they are wrong. Fair and effective jury deliberations require a frank and forthright exchange of views. [¶] As I previously instructed you, each of you must decide the case for yourself. But you should do so only after a full and complete consideration of all the evidence with your fellow jurors. [¶] It is your duty as jurors to deliberate with the goal of arriving at a verdict on a charge if you can do so without violence to your individual judgment. [¶] Both the People and the defendant are entitled to the individual judgment of each juror. [¶] As I previously instructed you, you have an absolute—you have the absolute discretion to conduct your deliberations in any way you deem appropriate. [¶] I may suggest that since you have not been able to arrive at a verdict using the methods you have chosen, that you should consider a change—that you consider to change the methods you have been following, at least temporarily, and try new methods. [¶] For example, you may wish to consider having different jurors lead discussion for a period of time. Or you may wish to experiment with reverse role playing by having one of those on one side of an issue present and argue the other side's position and vice versa. This might enable you to better understand the others' positions. [¶] By suggesting that you should consider changes in your methods of deliberations, I want to stress that I am not dictating or instructing you as to how you should conduct your deliberations. I merely may find it productive to do so and to do whatever is necessary to ensure that each juror has a full and fair opportunity to express his or her views and to consider and understand the views of the other jurors. [¶] I also suggest that you reread CALCRIM instructions [Nos.] 200

and 3550. These instructions pertain to your duties as jurors and make recommendations on how you should deliberate. [¶] The integrity of a trial requires that jurors at all times during deliberations conduct themselves as required by the instructions. CALCRIM instructions [Nos.] 200 and 3550 define the duties of a juror. [¶] The decision the jury renders must be based on the facts and the law. You must determine what facts have been proved by the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation. [¶] Second, you must apply the law that I state to you as to the facts as you find them and in this way arrive at your verdict. You must accept and follow the law as I state it regardless of whether you agree with the law. [¶] If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflicts with my instructions on the law, you must follow my instructions. [¶] CALCRIM instruction [No.] 3550 defines the jury's duty to deliberate. The decisions that you make in this case must be based on the evidence received in this trial and the instructions given by the Court. These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. [¶] CALCRIM instruction [No.] 3550 also recommends how jurors should approach their task. [¶] You should keep in mind the recommendations this instruction suggests when considering the additional instructions, comments and suggestions that I've made in the instructions now being presented to you. I hope my comments and suggestions may have some assistance to you. [¶] You are ordered to continue your deliberations at this time. If you have other questions, concerns, requests or any communication you desire to report to me, please, again, put those in writing. [¶] Again, ladies and gentlemen, at this time I will direct you to continue your deliberations. If after considering the further comments of the Court, you again are at an impasse, then please advise me. [¶] If you also believe that there is some additional readback that we can provide you or some additional clarification or explanation of the jury instructions, please let us know, and that's also something that I

can provide to you. [¶] So, again, ladies and gentlemen, I will send you back. You have the verdict forms for Count [two] and the lesser included offense of Count [six]."

Defendant did not object to this supplemental instruction. After 56 minutes of further deliberations, the jury convicted defendant of count two and attempted sexual intercourse with a child 10 years of age or younger (the "lesser" to count six).

Prior to sentencing, defendant moved to dismiss his conviction on count six, arguing attempted sexual intercourse of a child 10 years of age or younger was not a lesser included offense of the crime charged, section 288.7, subdivision (a). The trial court denied defendant's motion. According to the trial court, attempt was a lesser included offense of the completed crime because the only element that was lacking was defendant's penetration of the vaginal opening of the child.

The trial court sentenced defendant to an aggregate sentence of 27 years in state prison, as follows: on count one, 10 years (the upper term) (§ 288, subd. (b)(1)); on counts two, three, four, and seven, two years each for a total of eight years (§ 288, subd. (a)); and on count six, nine years (the upper term for violating a position of trust) (§ 664/288.7, subd. (a)). With respect to count five (§ 288, subd. (a)), the trial court stayed imposition of any sentence pursuant to section 654.

DISCUSSION

1.0 Attempted Sexual Intercourse Is Not a Lesser Included Offense of the Crime for Which Defendant Was Charged

Defendant contends his conviction for attempted sexual intercourse with a child 10 years of age or younger must be reversed because it is not a lesser included offense of the crime actually charged—section 288.7, subdivision (a). The People concede the error; we agree and shall reverse.

A trial court "must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) An uncharged crime is a lesser included offense of a charged crime if it meets either the "elements" test or the "accusatory pleading" test. (*People v. Smith* (2013) 57 Cal.4th 232, 240.) "The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater." (*People v. Bailey* (2012) 54 Cal.4th 740, 748.) The accusatory pleading test is met when the " 'facts actually alleged in the accusatory pleading[] include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " (*Smith, supra*, at p. 240.)

The elements of sexual intercourse with a child 10 years of age or younger are: (1) the defendant engaged in an act of sexual intercourse with the victim; (2) when the defendant did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old. (§ 288.7, subd. (a); CALCRIM No. 1127.) Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097.) It is a general intent crime. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1018.) Attempted sexual intercourse consists of "two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) Accordingly, there are different mental states required, and, under the elements test, attempted sexual intercourse is not a lesser included offense of the charged completed crime. (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 (*Mendoza*); see *People v. Ngo* (2014) 225 Cal.App.4th 126, 156 ["when the completed offense is a general intent crime, an attempt to commit that offense does not meet the definition of a lesser included offense

under the elements test because the attempted offense includes a specific intent element not included in the complete offense"].)

Nor was attempted sexual intercourse with a child 10 years of age or younger a lesser included offense under the accusatory pleading test. The amended information charges in count six that "defendant, being 18 years of age or older, did willfully and unlawfully commit an act of sexual intercourse or sodomy with [A.M.], a child 10 years of age or younger, to wit, age 4 or 5 years, at the ranch in Yuba County." The count tracks the statutory language defining the crime of sexual intercourse with a child 10 years of age or younger and fails to charge that defendant had a specific intent to commit the offense, a necessary element of attempted sexual intercourse. Accordingly, under the accusatory pleading test, attempted sexual intercourse is not a lesser included offense of the charged completed sexual intercourse. (See *Mendoza, supra*, 240 Cal.App.4th at p. 83.)

Because attempted sexual intercourse is not a lesser included offense, it was error for the trial court to instruct *sua sponte* on an uncharged crime. Despite the trial court's reasoning, the error was prejudicial because the People did not amend the information and defendant was found not guilty of the completed crime for which he was charged. As such, we shall reverse defendant's conviction on count six. (See *People v. Breverman* (1998) 19 Cal.4th 142, 149 [reversal for instructional error requires a showing of prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836].) Because the trial court stayed imposition of a sentence on count five due to defendant's conviction for attempted sexual intercourse, we shall remand for resentencing.

2.0 Trial Court's Supplemental Instruction Was Not Coercive

Defendant contends the trial court erred in its instruction to the deadlocked jury, which was virtually identical to an instruction approved in *People v. Moore* (2002)

96 Cal.App.4th 1105 (*Moore*). According to defendant, the trial court's charge was coercive and prejudicial. We disagree.

Under section 1140, a trial court has discretion to declare a mistrial or order further deliberations when a jury indicates it is deadlocked as to one or more charges against a defendant. (*People v. Bell* (2007) 40 Cal.4th 582, 616, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) However, " '[t]he court must exercise its power . . . without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." ' " (*People v. Whaley* (2007) 152 Cal.App.4th 968, 980.) The court "may direct further deliberations upon its reasonable conclusion that such direction would be perceived ' "as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered." ' " (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

A trial court ordering further deliberation may not "(1) encourage[] jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) state[] or impl[y] that if the jury fails to agree the case will necessarily be retried," such as the " '*Allen* charge,' " given in *Allen v. United States* (1896) 164 U.S. 492 [41 L.Ed. 528]. (*People v. Gainer* (1977) 19 Cal.3d 835, 852 & 842-843 (*Gainer*), disapproved on other grounds in *People v. Valdez* (2012) 55 Cal.4th 82, 163-165.)

As defendant concedes on appeal, the trial court's instruction was drawn almost verbatim from instructions this court upheld in *Moore* and the Sixth Appellate District upheld in *Whaley*. In support of his argument, defendant cites several Supreme Court, Tenth Circuit, and Ninth Circuit cases, all of which predate and fail to contradict *Moore* and *Whaley*. Just as in *Moore* and *Whaley*, the trial court's instruction specifically advised the jurors to " 'decide the case for yoursel[ves],' " only after a " 'full and

complete consideration of all of the evidence with your fellow jurors,' " and to arrive at a verdict only " 'if you can do so without violence to your individual judgment.' " (*Moore, supra*, 96 Cal.App.4th at pp. 1118-1119.) In addition, the trial court appropriately encouraged jurors to consider different methods, such as arguing the other side's position to "better understand the others' positions." The instruction did not single out holdout jurors, encourage jurors to reconsider their positions in light of the majority opinion, or indicate the case would need to be retried if they failed to reach a verdict. (See *Gainer, supra*, 19 Cal.3d at p. 852.) As explained in *Moore* and *Whaley*, such an instruction "simply remind[s] the jurors of their duty to attempt to reach an accommodation," and is not coercive. (*Moore, supra*, 96 Cal.App.4th at p. 1121.)

Moreover, given that the jury had already spent a day deliberating at the time it received the additional instruction, we do not find the 56-minute deliberation overly hasty or indicative of coercion. As such, we find no error in the trial court's additional instruction.

DISPOSITION

The judgment on count six is reversed and the matter is remanded for resentencing. The judgment is otherwise affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.